Office-Supreme Court, U.S.
FILED
SEP 2 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 515

JACK A. GULLO,
Petitioner,

v.

BRUCE E. LAMBERT
and
MIRIAM ANNE HIRST,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH SAMUEL GULLO
2510 Virginia Avenue, N.W.
#505N
Washington, D.C.
Attorney for Petitioner

INDEX

INTRODUCTION 1
OPINIONS BELOW 2
JURISDICTION. 2
QUESTIONS PRESENTED 2
CONSTITUTION AND STATUTES INVOLVED 2
PROCEEDINGS IN LOWER COURTS 3
STATEMENT. 5
REASONS FOR GRANTING WRIT 9
CONCLUSION 13
APPENDIX A – Judgment entered, June 6, 1966, U.S. Court of Appeals for the District of Columbia Circuit. 15

CITATIONS

CASES:

Aetna Cas. Co. v. Board of Supervisors, 168 S.E. 617, 627, 160 Va. 11, 46. 9
Allen v. Allen, 52 N.M. 174, 194 P.2d 270 . . . . . 8, 12
Bell v. Bell, 181 U.S. 175, 21 S. Ct. 551 12
Bernstein v. Bernstein, (1/6/1964, N.M.) 388 P.2d 187 12
Chitwood v. Prudential, (9/10/1965) 206 Va. 314, 317, 143 S.E.2d 915. 11
Frey v. Frey, 61 App. D.C. 232, 59 F.2d 1046 10
Griffin v. Griffin, (App. D.C.) 327 U.S. 220, 66 S.Ct. 556. 9
Heflinger v. Heflinger, 136 Va. 289, 188 S.E. 316. 11
Naim v. Naim, 350 U.S. 891, 76 S. Ct. 151, 90 S.E.2d 849, 197 Va. 734. 10
Oliver v. Oliver, 87 U.S. App. D.C. 334, 185 F.2d 429 . . . . . 10, 11
Simmons v. Simmons, 57 App. D.C. 216, 19 F.2d 690. 10

Smith v. Smith, 200 Va. 77, 104 S.E.2d 17 . . . . . 4, 10

Stevens v. Stevens, 304 Ill. 297, 136 N.E. 785 11

Streitwolf v. Streitwolf, 181 U.S. 179,
21 S. Ct. 558 12

Toler v. Oakland Smokeless Corporation,
173 Va. 425, 4 S.E.2d 364 . . . . . 10, 11

CONSTITUTION AND STATUTES:

Amendment XIV Section 1, Constitution of
the United States 2

New Mexico Statute, Laws 1951, ch. 107,
Sec. 22-7-4 (Copy R.89, Ex. P) 8, 11

District of Columbia Code:

Section 30-101 . . . . . 2, 8, 9, 10
Section 30-110 8
Section 16-421 . . . . . 8, 9
Section 13-336 & 337 4

Code of Virginia, 1950 ed., as amended:

Sections 20-41 & 20-43 . . . . . 9, 10
Section 20-54 10
Section 20-107 . . . . . 3, 10
Section 8-499 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

JACK A. GULLO,
Petitioner,

v.

BRUCE E. LAMBERT
and
MIRIAM ANNE HIRST,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To The Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States.

Jack A. Gullo, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on June 6, 1966, (Appendix A, *infra*, p.).

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is set forth on page 132 of the record. The United States Court of Appeals for the District of Columbia Circuit did not render an opinion in this cause.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 6, 1966, (Appendix A, *infra*, p.). The judgments of the District Court appealed from this cause were entered on September 14, 1965, (R. 131) and on March 29, 1965, (R. 115). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

This case involved two questions. First, whether it was a violation of the due process and equal protection clause of the federal Constitution (R. 20-g) for the District Court below to deny petitioner to show the nullity of a District of Columbia marriage contract under *Section 30-101, D.C. Code* to prove respondents' defense is not a bar to his amended complaint. Second, whether giving recognition and legal effect to the Virginia divorce decree on the void District of Columbia marriage contract deprived petitioner of his property, rights, status, and other legal relations, without the due process and equal protection of the law.

CONSTITUTION AND STATUTES INVOLVED

The pertinent provisions of the federal Constitution and statutes of the District of Columbia, the State of Virginia, and the State of New Mexico, are hereinafter discussed in the argument, and are set out fully in the record. (R. 15-18).

PROCEEDINGS IN LOWER COURTS

Petitioner, Jack A. Gullo, a resident of the District of Columbia, brought this action in tort against Respondents, Bruce E. Lambert and Miriam Anne Hirst, for $35,000.00 arising from their joint wrongful taking of his property. He requested a trial by jury. (R. 38).

Lambert filed his motion for summary judgment (R. 49) raising the defense of *res judicata* (R. 104) by Hirst's Virginia divorce decree (R. 52, Ex. 2) on a supposed District of Columbia marriage contract (R. 92, Ex. S) as a bar to the amended complaint. He filed no affidavit in support of his motion.

To this defense of *res judicata,* Gullo filed his Affidavit (R. 64); annexed copies of judicial and public documents (R. 71-102, Exs. E-W); and his Statement of Material Facts (R. 110) as to which respondents admit there is no genuine issue; in support of his opposing motion (R. 62) to show Hirst's District of Columbia marriage contract is a nullity and her Virginia divorce decree is not a bar to his legal claim in the action herein.

On about September 28, 1962, Lambert wrongfully requested (R. 101, Ex. V); the Commissioner of Sale named in the said Virginia divorce decree (R. 55, Ex. 2) to wrongfully attach the real property of the parties.

Without due notice (R. 102, Ex. W) to Gullo, then a non-resident of Virginia, the said Commissioner supposedly sold it to respondent Hirst (R. 59, Ex. 6) for the mutual benefit of said respondents and Commissioner of Sale (R. 69, 70).

This was without due process (R. 10, 11); for in the State of Virginia under *Section 20-107, Va. Code, as amended 1962,* a divorce court does not have jurisdiction, or authority, even in valid divorce decree, to order the sale of the real property of the parties. This section as amended June, 1962, codified the meaning of the

word *"ESTATE"* as defined in the dissenting opinion in *Smith v. Smith*, (6/16/1958), 104 S.E. 2d 17, 200 Va. 77, as follows:

> "Upon decreeing the dissolution of a marriage . . . the court may make such further decree. . . concerning the estate . . . The word *'ESTATE'* (emphasis supp.) as used by this section means only those rights of the property created by the marriage in and to the real property of each other."

Gullo gave due notice (R. 117-119) to Hirst in Colorado on March 8, 1965, by the U.S. Marshal; that he was asking the courts to declare her District of Columbia marriage to be a nullity under *Section 30-101, D.C.Code, 1951 ed.*, to prevent the defeat of his legal claim by Lambert's defense by her Virginia divorce decree. *Sections 13-336 and 13-337, D.C. Code, 1961 ed., as amended,* (R. 16) authorizes such notices in actions for divorce and annulment. Under *Section 30-101, D.C. Code* (R. 15), the nullity of Hirst's marriage may be shown in any collateral proceedings.

Hirst by her attorney, the said Lambert, who himself first invoked the jurisdiction of the court over the said subject matter of divorce and marriage in his defense of *res judicata*, then filed a Motion To Quash this Notice (R. 119, 120) on grounds that she was a non-resident. In this motion, she also pleaded the Virginia divorce decree.

On June 6, 1966, the Court below entered a judgment (Appendix A, *infra*, p. 15), affirming the order of the District Court entered on March 29, 1965 (R. 115); and the final order entered on September 14, 1965 (R. 131); from which orders Gullo filed a notice of appeal on October 11, 1965 (R. 133).

In its final order (R. 131) and Memorandum Opinion (R. 132) entered on September 14, 1965, the District Court denied Gullo's motion for a decree declaring the nullity of the District of Columbia marriage as proof that respondents' defense fails to state a legal defense

to his amended complaint; it held the notice (R. 117-119), given on March 8, 1965, asking the court to decree the nullity of the marriage, was void and of no legal effect because Hirst was a non-resident; it dismissed the action as to Hirst without prejudice for lack of jurisdiction over her; and it dismissed the action itself because summary judgment had been granted to Lambert in its order entered on March 29, 1965.

The District Court entered this order (R. 115) on March 29, 1965, granting Lambert's motion for summary judgment on his defense of *res judicata* without determining whether the Virginia divorce decree was a legal defense to Gullo's amended complaint upon appearing to the court; (a) that Hirst had not been given proper notice for the court to declare the nullity of the District of Columbia marriage; (b) the parties admitted (R. 115) the facts contained in: (1) Gullo's Opposing Affidavit (R. 64); (2) the exhibits annexed thereto which consist of certified and authenticated copies of judicial and public documents (R. 71-102, Exs. E-W); (3) Gullo's Statement of Material Facts (R. 110) as to which respondents admit there is no genuine issue.

A summary of these admitted and undisputed facts, which conclusively establish that Hirst's District of Columbia marriage is a nullity and her Virginia divorce decree is not a bar to his amended complaint, is given below.

STATEMENT

1. Neither Hirst nor her former husband, John J. Brown, had ever lived, or had his or her residence, in the State of New Mexico. This is seen from Hirst's Statement (R. 71-74, Ex. E) giving the dates and place of her residence from January 1, 1936 to August 9, 1957, inclusive, which has been received in evidence by stipulation (R. 66, 135) of the parties in open court.

This official statement, which was obtained from the

records of the federal Government, was signed, and certified by Hirst on August 9, 1957, as being true, complete, and correct.

Hirst was born on April 25, 1927, at Mt. Carmel, Pennsylvania, where she resided until December 5, 1948. On March 31, 1947, she married (R. 78, Ex. H) Brown, of Mt. Carmel, Penna.; and left him at their last marital home at Mt. Carmel, Penna. on September 28, 1948 (R. 82, Ex. I), where he has continued to reside until after the commencement of this action (R. 66, 77, Ex. G). On December 5, 1948, Hirst moved from Mt. Carmel, Penna. to Arlington, Virgnia, where she lived until May 1, 1949.

2. From May 1, 1949 to December 18, 1954, inclusive, Hirst resided in the District of Columbia. It was within this period, that she fraudulently obtained a decree of divorce in New Mexico on February 17, 1951, and remarried in the District of Columbia on April 28, 1951, to evade the laws and public policy of the District of Columbia.

3. On August 21, 1961, Hirst by her attorney, Lambert, admitted in a statement filed in court (R. 75, Ex. F) that she was not domiciled in the State of New Mexico at the time she obtained her divorce from her former husband, John J. Brown. She admits (R. 111, 112) she did not comply and fulfill the New Mexico statutory requirement for residence in obtaining the divorce from her former husband, Brown. She claims (R. 69) such fact is of no consequence; because the full faith and credit clause of the federal Constitution prohibited Gullo to attack collaterally her New Mexico divorce decree in the State of Virgnia.

4. Further, Hirst admits (R. 111) Brown did not make an appearance in her divorce action in New Mexico. The Civil Docket (R. 79-81, Ex. I-1) and pleadings show Brown was not represented by an attorney at any time, nor did he make an appearance in any manner.

5. In early February of 1951, Hirst went to New Mexico by plane (R. 134) to obtain her divorce decree dated February 17, 1951. She stayed in New Mexico two or three days (R. 135); and then returned to her residence in the District of Columbia.

6. Hirst practiced fraud on the New Mexico court by representing falsely under oath in her complaint for divorce (R. 82, Ex. I) filed on January 15, 1951, that she was a resident of New Mexico. Upon such complaint, the New Mexico court entered the decree on February 17, 1951 (R. 86, Ex. M), granting Hirst an absolute divorce from Brown on grounds of incompatibility; incompatibility was not grounds for divorce in the District of Columbia. On March 6, 1951, the court entered an order (R. 89, Ex. O) granting Hirst's petition to change her name to her maiden name 'RUTHS").

7. Brown executed the said Affidavit of Entry of Appearance and Waiver (R. 84, Ex. K) in the State of Pennsylvania in the presence of his wife Hirst, (R. 135), on January 5, 1951. Brown then gave this Waiver to Hirst, who on January 8, 1951, mailed it; and her letter (R. 85, Ex. L) containing the information to draft the complaint for divorce; to her attorney in New Mexico. Hirst with the consent of her husband, Brown, brought her divorce action in New Mexico because incompatibility was not grounds for divorce in the District of Columbia or in the State of Pennsylvania. The civil docket, *supra*, shows that on January 15, 1951, Hirst's attorney filed all the pleadings in her divorce action, which consist of: The Complaint for Divorce; the said Affidavit of Appearance & Waiver; and the Affidavit of Military Service.

8. Hirst then concealed this decree of divorce from the Clerk of the U.S. District Court of the District of Columbia by swearing falsely under oath before the said clerk on March 30, 1951, in her Application (R. 91, Ex. Q) for the Marriage License (R. 92, Ex. R) that she had no former marriages in order to enter into the second

ceremonial marriage (R. 92, Ex. S) with Gullo within six months of the said divorce decree; which Hirst then as a citizen of the District of Columbia had knowledge that such second marriage was prohibited under *Section 16-421, D.C. Code, 1951 ed.* Such false swearing is deemed perjury under *Section 30-110, D. C. Code 1951 ed.*

Under *Section 16-421, supra,* Hirst's marriage to Brown remains undissolved and her attempted marriage to Gullo under this section is stamped a nullity under *Section 30-101, D. C. Code.*

9. Hirst filed a complaint for divorce (R. 96, Ex. T-1) in the Circuit Court of Fairfax County, Virginia against Gullo from the District of Columbia marriage on April 28, 1951. As a defense thereto, Gullo filed a Plea To Annul the said marriage (R. 94, Ex. T); upon the grounds that Hirst's purported New Mexico divorce was obtained by her fraud practiced on New Mexico divorce court and was void for want of jurisdiction under *New Mexico Statute, 1951 Ch. 107, Sec. 22-7-4* (R. 17, 89, Ex. P), *Allen v. Allen,* 194 P.2d 270, 52 N.M. 174. Consequently, her marriage to Brown remains valid, subsisting, and undissolved. In his Plea, Gullo asserts, and respondents admit, that he entered into the marriage contract in good faith and in ignorance of Hirst's incapability as aforesaid.

A Judge *pro tem* sustained Hirst's objection (R. 75, Ex. F) to disregard the evidence taken in the Plea, as in a Motion To Strike, and dismissed it for the reason (R. 98, Ex. T-4):

> ". . . the full faith and credit clause prohibits Gullo from attacking Hirst's prior New Mexico divorce decree in the State of Virginia. . . ."

He entered the decree *Chancery No. 15253, dated April 28, 1961* (R. 52, Ex. 2), in which he dismissed the Plea and granted the divorce over Gullo's objections. Respondents rely upon this decree for their defense of *res judicata* (R. 104, 105).

No determination was made; (1) whether the divorce decree rendered by the divorce decree of New Mexico was a nullity in the State of New Mexico under New Mexico Statute; (2) whether Hirst's marriage to Gullo was bigamous, void, and contrary to the laws and public policy of the State of Virginia under *Sections 20-41 & 20-43, Va. Code 1950 ed, as amended.* (R. 17).

Nor was opportunity given to show that the marriage contract in the District of Columbia on April 28, 1951, was a nullity under *Section 30-101, D. C. Code, 1951 ed., as amended* (R. 15, 16); and contrary to the public policy of the District of Columbia under *Section 16-421, D. C. Code, 1951 ed.*

10. The Supreme Court of Appeals rejected Gullo's petition for appeal on a technical defect of the record (R. 57, Ex. 3). In Virginia by statute, such a dismissal does not impart validity to a void judgment, *Section 8-499, Va. Code, 1950 ed., as amended, Aetna Gas Co. v. Board of Supervisors*, 168 S.E. 617, 627, 160 Va. 11, 46. In this case, the Virginia court stated a void decree is a nullity and may be vacated at any time.

REASONS FOR GRANTING THE WRIT

The petitioner asserts that a writ of certiorari should be granted because:

1. (a) It was a violation of the due process and equal protection clause of the federal Constitution (R. 18) for the District Court below (R. 20-g) to deny him the right to show the nullity of Hirst's District of Columbia marriage contract to prove respondents' defense by Hirst's Virginia divorce decree fails to state a legal defense to his amended complaint (*Griffin v. Griffin*, (App. D.C.) 327 U.S. 220, 66 S. Ct. 556).

(b) In giving recognition and legal effect to such Virginia divorce decree on the void District of Columbia marriage contract, the District Court deprived Gullo of his status, property, and other legal relations.

(c) In the State of Virginia, under *Section 20-107, Va. Code 1962, as amended,* a divorce court does not have jurisdiction, or authority, even in valid divorce decree, to order the sale of the real property of the parties. The taking of such property is without the judicial process of law, (*Smith v. Smith,* (6/16/1958), 104 S.E.2d 17, 200 Va. 77 (dissenting opinion)).

2. The statutes and public policy of the District of Columbia, like those of the State of Virginia, as reflected by legislative pronouncement and judicial construction, are emphatically opposed to the recognition of the validity of a bigamous union. *Sections 30-101, D. C. Code, 1951 ed.* (R. 15); *Sections 20-41 & 20-43, Va. Code, 1950 ed., as amended* (R. 117). In the State of Virginia, the courts have held that the offense under *Sections 20-41 and 20-43,* is more serious than that under *Section 20-54,* with reference to miscegenation, *Toler v. Oakland Smokeless Coal Corp.,* 4 S.E. 364, 173 Va. 425, *Naim v. Naim,* 350 U.S. 891, 76 S. Ct. 151, 90 S.E. 2d 849, 197 Va. 734.

Under *Section 30-101, D.C. Code,* Hirst's marriage with Gullo in the District of Columbia on April 28, 1951, after Hirst fraudulently obtained a decree of divorce in New Mexico on February 17, 1951, on her complaint filed January 15, 1951; was prohibited and absolutely void *ab initio,* without being so decreed; because her previous subsisting and valid marriage to John J. Brown has not been terminated by death or a lawful decree of divorce. Under this section, the nullity of such a marriage may be shown in any collateral proceedings, *Frey v. Frey,* 59 F.2d 1046, 61 App. D.C. 232; *Simmons v. Simmons,* 19 F.2d 690, 57 App. D.C. 216.

Also, under *Section 16-421, D.C. Code, 1951 ed.* (R. 15, 16), Hirst's marriage to her first husband, Brown, remains undissolved within six months of her decree of divorce; and her attempted second marriage with Gullo within such time is a nullity and comes under the ban of *Section 30-101, D.C. Code, supra, Oliver v. Oliver,* 185

F.2d 429, 87 U.S. App. D.C. 334; *Stevens v. Stevens*, 136 N.E. 785, 304 Ill. 297.

After such marriage in the District of Columbia, Hirst cohabited with Gullo in the State of Virginia. This marriage in the State of Virginia also was bigamous and void, without any decree of divorce, or other legal process under *Sections 20-41 & 20-43, Va. Code, supra, Toler v. Oakland Smokeless Corporation*, 4 S.E. 364, 173 Va. 425, (cited with approval 9/10/1965) in *Chitwood v. Prudential*, 143 S.E.2d 915, 206 Va. 314, 317); *Heflinger v. Heflinger*, 188 S.E. 316, 136 Va. 289.

The District of Columbia courts, like the courts of the State of Virginia, *supra*, consistently have held; that such a bigamous and void marriage confers no legal rights; a divorce decree on such void marriage is void itself; it is as if no marriage has ever been performed; and its nullity may be shown in any court; whether the question arises directly or collaterally.

Thus by virtue of constitutional provision, statute, public policy, and judicial construction, the Virginia divorce decree on the void District of Columbia marriage contract is a nullity, confers no legal rights, and it is not a bar to Gullo's legal claim in his action herein against respondents, Lambert and/or Hirst.

3. Hirst admits (R. 11, 112), she failed to fulfill the New Mexico statutory jurisdictional requirement for residence in her divorce action in New Mexico. This judicial admission has not been denied by Hirst or her attorneys.

To maintain this divorce action against Brown, the *New Mexico Statute 1951 ch. 107, Section 22-7-4* (R. 17, 89 Ex. P) required Hirst to have been an actual resident of the State of New Mexico for one (1) year next preceding the filing of her complaint on January 15, 1951, for her decree of divorce entered on February 17, 1951. To evade and violate this statutony requirement, Hirst false-

ly swore under oath to the New Mexico divorce court that she was a resident of New Mexico. The courts of New Mexico hold in such a case that the divorce court does not have jurisdiction to enter the divorce decree; that the action of the divorce court in entering the decree on February 17, 1951, was *coram nonjudice;* and that the decree of divorce is void; *Allen v. Allen,* 194 P.2d 270, 52 N.M. 174, cited with approval (1/6/1964, N.M.) in *Bernstein v. Bernstein,* 388 P.2d 187.

This Court has held such a decree, which is a rullity in the State of New Mexico in which neither party was domiciled, is invalid and entitled to no recognition in another state. *Bell v. Bell,* 181 U.S. 175, 21 S. Ct. 551, *Streitwolf v. Streitwolf,* 181 U.S. 179, 21 S.Ct. 553.

4. Hirst with the consent of her former husband, Brown, evaded and violated the laws of the District of Columbia by going to New Mexico to obtain the divorce on grounds of incompatibility; because incompatibility was not grounds for divorce in the District of Columbia, or in the State of Pennsylvania, which was the State of her last marital domicil; and where Brown has continued to reside.

Hirst further evaded and violated the laws and public policy of the District of Columbia by concealing her divorce and marriage to Brown; and swearing falsely in her Application for her marriage license that she had no former marriages. Such false swearing is deemed perjury under *Section 30-110, D. C. Code, 1951 ed., as amended* (R. 15).

The courts do not permit its citizens to evade and violate its laws and public policy by committing perjury, fraud, and by going outside its jurisdiction to avoid them. *Oliver v. Oliver, Heflinger v. Heflinger, Stevens v. Stevens, supra.*

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH SAMUEL GULLO

2510 Virginia Avenue, N.W.
#505N.
Washington, D.C.

Attorney for Petitioner

Date: September, 1966

APPENDIX A

[Filed June 6, 1966]

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 19,792 September Term, 1965
Civil 1785-64

Jack A. Gullo,
Appellant,

v.

Miriam Anne Hirst, et al.,
Appellees.

Appeal from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, and Danaher and McGowan, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

It having appeared that the District Court entered judgment for the appellee Bruce E. Lambert in accordance with its order of March 29, 1965; and that the District Court on September 14, 1965 filed its memorandum and caused to be entered its order dismissing the complaint without prejudice as to the appellee Miriam Anne Hirst;

On consideration whereof It is ORDERED and ADJUDGED by this Court that the judgments of the District Court appealed from in this cause be and they are affirmed.

It is further ordered by the Court that appellees herein recover from the appellant their taxable costs on this appeal and have execution therefor.

Per Curiam.

Dated: June 6, 1966.